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Supreme Court of the United States

October Term, 1970

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and
THEODORE BENAZET,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 21, 1971

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Atlantic Coast Line Railroad Company (Atlantic) seeks a writ of *certiorari* to review a decision of the United States Court of Appeals for the Second Circuit in the case of *Benazet* v. *Atlantic Coast Line R.R.*—F.2d—(1971) Docket Nos. 35278, 35279, insofar as the decision affirmed an order entered by the United States District Court for the Southern District of New York dismissing Atlantic's third party claim against Erie Lackawanna Railroad Company (Erie) for contribution in the payment of a $200,000 judgment entered against Atlantic and in favor of Theodore Benazet (Benazet).

Opinions Below

The opinion and order of the District Court (Cooper, U.S.D.J.) are reported at 315 F.Supp. 357 and printed as Appendix A, pp. A1-A14, *infra.* The decision of the Court

of Appeals affirming the order of the District Court is printed as Appendix B, pp. B-1-B-8, *infra*.

Jurisdiction

The decision of the Court of Appeals affirming the order of the District Court was filed and entered on April 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Should this Court establish a right to contribution under maritime common law in non-collision cases?

2. Should a District Court sitting in diversity jurisdiction follow a state rule which applies a state statute granting a right of contribution between joint tortfeasors in actions arising from torts committed on navigable waters within the state?

Statutes Involved

New Jersey Joint Tortfeasors Contribution Law, §3 (N.J. Rev. Stat. 2A:53A-3) which provides:

> "Judgment against joint tortfeasor; contribution. Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person

shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought." L.1952, c. 335, p. 1075, §3.

Statement of the Case

Jurisdiction in the District Court rested on diversity of citizenship of the parties.

The action was commenced on May 5, 1966 by Benazet, a resident of New Jersey, against Atlantic, for injuries sustained by him on July 30, 1964 when he fell while working on a box car owned by Atlantic, but in the custody of Erie. Benazet was employed by Erie as a yard brakeman. The box car was being moved from the shore at Jersey City, New Jersey over a float bridge to Erie's car float, which was attached to the float bridge and floating on the Hudson River. Benazet fell in the process of tightening the hand-brake because both the footboard on which he was standing and the brake-wheel supports broke. The evidence showed that the footboard was decayed and that the brake-wheel supports had been damaged and improperly repaired somewhere in the course of the car's passage through many railroad systems. The evidence also showed that the defects should have been readily apparent and that Erie failed to discover them although it had a duty to inspect the car on receipt in interchange from a connecting line.

Atlantic impleaded Erie on the ground that Erie was negligent and liable to Atlantic for contribution or indemnity. Erie answered and participated as a third party defendant in the trial.

After the completion of the trial, the jury found that Atlantic was negligent. It also found that Erie was negligent and that Erie's negligence was a substantial factor in bringing about Benazet's injuries. The jury awarded a verdict of $200,000 to Benazet.

Erie moved for a post-trial order dismissing Atlantic's third party complaint as a matter of law on the ground that no right of contribution existed under maritime law or through supplementation of maritime law with state law.

The opinion and order of Cooper, J. filed July 2, 1970 (315 F. Supp. 357; Appendix A, pp. A1-A-16, *infra*) dismissed Atlantic's third party claim against Erie for contribution as a matter of law. This order was affirmed by the Second Circuit Court of Appeals (Smith, and Moore, C.J.J. and Timbers, D.J.) in an order and judgment filed April 23, 1971 (Appendix B, pp. B-1-B-10, *infra*).

Reasons for Granting the Writ

The reasons why this Court should now review and reverse the decision of the Court of Appeals may be summarized as follows: although the jury found that Erie was negligent and that its negligence was a substantial factor in bringing about Benazet's injuries, the Court of Appeals held that it was precluded from awarding contribution by this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp., infra;* the Court of Appeals decision conflicts with rulings in two other Circuits, and the Court of Appeals refused to follow this Court's decisions which permit supplementation of maritime law with state law where no maritime rule exists.

A. This Court should establish a rule of maritime law providing a right to contribution in non-collision cases.

The Court of Appeals incorrectly assumed that it could not award contribution in a non-collision case under maritime law because of this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282

(1952), in which case, this Court, in anticipation of Congressional action, declined to fill the void in the maritime law and permit contribution in a non-collision case. This Court should now undertake to consider the very question which it deferred in *Halcyon* in order to harmonize maritime law with tort concepts which are today universally accepted by statute and by decision in other fields of the law.

1. *This Court should not refrain any longer from establishing such a right to contribution in deference to Congress.*

This Court indicated, in 1952, in *Halcyon* that it would refrain from establishing a right of contribution in maritime law because Congress had passed a considerable amount of legislation in the area and should have the opportunity to decide this question as well. Nineteen years have passed, but Congress has not acted.

In the interim, this Court has moved forward to establish other important rules of maritime law without deferring to possible Congressional action. In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) this Court did not hesitate to shape a maritime right of action for wrongful death despite even greater Congressional activity in that area. The argument of Congressional preclusion was strongly rejected. *Moragne* at 405, n. 17. In a series of cases beginning with *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) this Court established a broad new rule of maritime indemnity even though the interests involved were virtually identical to those which *Halcyon* left for resolution by Congress.

The reasoning which convinced the Court that it should act in those instances is equally compelling here. Principles of ordinary justice dictate that where a party is found to be negligent and his negligence is found to have contributed

to plaintiff's injury, he should not emerge scot-free merely because plaintiff has elected to bring his action against the other tortfeasor. This theory is well established in railroad law where courts have enforced a right to contribution among joint-tortfeasors. *Chicago, R.I. & P.R. Co.* v. *Chicago & N.W. Ry. Co.*, 280 F.2d 110 (1960) cert. den. 364 U.S. 931 (1961). It is submitted that the fact that the accident happened on a float instead of a railroad track should not be determinative of the existence of a right to contribution.

2. The establishment of a right to contribution will harmonize areas of maritime law which are presently irreconcilable.

It was indicated in *Halcyon* that a maritime right of divided damages would be available in collision cases but that contribution in any form was not otherwise available under the state of the law at that time. No rationale for this distinction was stated. Subsequently, however, in *Ryan* and its progeny a completely new theory of maritime *indemnity* was created resulting in a complete shifting of loss if some form of contract with, or for the benefit of, a party can be found. This right of indemnity was not in existence before *Ryan* was decided. It would be equally as reasonable, if not more so, for this Court, at this time, to establish a right to contribution in non-collision cases.

As a result of the present state of the law, in cases of jointly caused injury, the distribution of the ultimate burden of compensating the injured party is arbitrarily dependent on whether the injury was caused in a collision or not, or whether some form of contractual obligation between the tortfeasors can be found. Where a collision is involved, damages are divided even if the joint tortfeasors are not equally at fault. Where the injury does not arise from a collision and the injured party sues only one of two joint

tortfeasors, the burden of compensation falls either entirely on the chosen defendant or, if a "warranty or workmanlike service" running to the defendant can be found, shifts entirely to the other joint tortfeasor.

It has been widely suggested that this Court must decide the question which it put aside in *Halcyon* and establish a right of contribution if consistency and rationality are to prevail in maritime personal injury actions. By granting a right of contribution in all maritime actions the difficulty of determining whether a *Ryan* implied warranty of workmanlike service applies in a given case would be eliminated. A distribution of loss in proportion to fault would be permitted rather than the arbitrary imposition of the entire loss on one party. The suggested rule would be far simpler to administer than the *Ryan* warranty theory, and it would thereafter be unnecessary for this Court to determine whether and to what extent counter warranties should be created to offset the *Ryan* warranty. See Gilmore & Black, *The Law of Admiralty* 367; Hart & Sachs, *The Legal Process: Basic Problems in the Making and Application of Law* 515 (tentative ed. 1958), Proudfoot, "The Tar Baby": Maritime Personal Injury Indemnity Actions, 20 Stan. L. Rev. 423, 425-26 and 445 (1968); Currie, Federalism and the Admiralty, "The Devil's Own Mess", The Supreme Court Rev. 158, 212-13 and 220-21 (1960); Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers, 39 Cornell L. Rev. 381 at 421-22 and 424 (1954).

3. *The rule of stare decisis does not prevent this Court from considering this question; it was not decided in Halcyon.*

It is clear that the *Halcyon* decision is not entitled to *stare decisis* effect since no rule was articulated there. *Halcyon* can only be read as indicating that the Court was unwilling to establish a rule at the time of decision because

of the particular circumstances prevailing then. The Court gave no indication that it did not intend to reserve its power to establish such a rule at a later time.

Even if the Court's failure to articulate a rule is itself a "rule", it would not be entitled to *stare decisis* effect when measured against the standards for *stare decisis* set forth in *Moragne, supra,* at 403-5. The allowance of contribution could not disturb the confidence of people in their ability to predict the legal consequence of their actions. As has been seen, the failure to provide a maritime right of contribution in non-collision also:

> . . . "rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and . . . has produced litigation-spawning confusion in an area that should be easily susceptible to more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication. Finally, a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne* at 404-5.

B. The decision of the Court of Appeals conflicts with decisions of other Courts of Appeals.

The Court of Appeals stated that "Atlantic's contribution claim, so far as the equities are concerned, is appealing." The Court felt, however, that it was prevented from awarding contribution by *Halcyon,* citing the view expressed through Judge Friendly in *McLaughlin* v. *Trelle-*

borgs Angfartygs A/B, 408 F.2d 1334 (2d Cir.), *cert. denied*, 395 U.S. 946 (1969):

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . ." 408 F.2d at 1338.

The Court of Appeals for the Fifth Circuit has also indicated its dissatisfaction with *Halcyon*. In *D/S Ove Skou* v. *Hebert*, 365 F.2d 341 (5th Cir. 1966) the Court through Judge Brown noted that "it was not undertaking to rule for all time that . . . there might never be an acceptable, equitable basis for distributing the burden of a loss resulting from the operational cooperation of breaches or wrongs of several parties. . . ." More recently, in *Horton & Horton, Inc.* v. *T/S J. E. Dyer*, 428 F.2d 1131 (5th Cir. 1970), *cert. denied sub nom. Horton & Horton, Inc.* v. *Vaughan Marine, Inc.*, 400 U.S. 993 (1971) and *Watz* v. *Zapata Off-Shore Co.*, 431 F. 2d 100 (5th Cir. 1970) the Court of Appeals for the Fifth Circuit decided that the *Halcyon* rule that there was no right contribution in non-collision cases was only *dicta*. The Court of Appeals awarded contribution in both cases.

The Court of Appeals for the Third Circuit allowed contribution in a non-collision case decided after *Halcyon*. In *Crain Bros. Inc.* v. *Wieman and Ward Co.*, 223 F.2d 256 (3rd Cir. 1955), contribution was awarded where damage to cargo was caused equally by unseaworthy barges and by the negligence of the charterer of the barges. No mention of *Halcyon* was made in the decision.

Thus there is no conflict between the Circuits as to the unsoundness of the *Halcyon* rule. The conflict has arisen because the Second Circuit concludes that it cannot award contribution "as long as *Halcyon* remains on the books", while the Fifth Circuit has interpreted *Halcyon* very narrowly and the Third Circuit has simply ignored it.

C. The Court of Appeals erred in failing to follow the New Jersey rule which would apply a New Jersey statute creating a right of contribution.

The Court of Appeals incorrectly assumed that the failure of this Court to establish a right to contribution in *Halcyon* precluded it from supplementing maritime law with a New Jersey statute which would permit contribution.

1. *The Court of Appeals improperly applied Halcyon as a bar to supplementation.*

The Court of Appeals mistakenly thought that *Halcyon* prevented it from following the New Jersey rule which supplements maritime law with a New Jersey statute, N.J. Rev. Stat. §2A:53A (West 1952) ("the Joint Tortfeasors Act"), permitting contribution among joint tortfeasors.

The Court of Appeals' conclusion is incorrect for several reasons. First, *The Harrisburg*, 119 U.S. 199 (1886) clearly established that no maritime right to an action for wrongful death existed in maritime law, yet during the long period of vitality of *The Harrisburg* it was never suggested that it precluded the application of state wrongful death statutes to supplement maritime law. Second, the arguments of Congressional preclusion and deference to legislative expertise should not be construed to prevent the application of a state statute in this case any more than they prevented this Court from establishing a maritime action for wrongful death in *Moragne*. Finally, in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1954), this Court decided not to establish a rule concerning maritime insurance contracts, citing *Halcyon*, but indicated that state laws might be applied. *Id.* at 320-21.

2. *Supplementation should be allowed where state interests are strong and no federal right would be abridged.*

This Court has often applied state laws to supplement maritime law where state interests are strong and no federal right would be abridged. See, e.g., *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co., supra.*

Here there is no possibility that any federal right might be abridged, for the Joint Tortfeasors Act cannot be used to prevent Benazet from a full recovery. *Tino* v. *Stout,* 49 N.J. 289, 229 A.2d 793 (1967). On the contrary, New Jersey has a strong interest in seeing that contribution is awarded to do justice to Atlantic and to insure that Erie does not escape all liability for its own negligence. Cf. *Frueh* v. *Kupper,* 54 N.J. Super. 296, 148 A.2d 743 (1959), where the New Jersey Superior Court unhesitatingly applied the Joint Tortfeasors Act to supplement maritime law.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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July 21, 1971

APPENDIX A

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 1404

THEODORE BENAZET,

against *Plaintiff,*

ATLANTIC COAST LINE RAILROAD COMPANY,
Defendant and Third-Party Plaintiff,

against

ERIE LACKAWANNA RAILROAD COMPANY,
Third Party Defendant.

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IRVING BEN COOPER, D. J.

Opinion

Plaintiff Benazet brought suit against defendant Atlantic Coast Line Railroad Company (Atlantic) for damages suffered as a result of his fall from a railroad boxcar owned by Atlantic claiming Atlantic negligently released the car into commerce in a defective condition and failed to inspect, repair and warn of the defective condition. This action was removed to this Court from the Supreme Court, New York County, by Atlantic, federal jurisdiction resting upon diversity of citizenship. Thereafter, Atlantic impleaded plaintiff's employer Erie Lackawanna Railroad Company (Erie) asserting that Erie was in possession of the car at the time of the accident and was negligent in failing to properly inspect the car so as to discover any defective condition and, thus, liable either in contribution or indemnity for either one-half or the full amount, respectively, of any judgment plaintiff might recover against Atlantic.

Following a four day trial, the jury on April 16, 1970 returned a verdict in favor of plaintiff in the amount of $200,000. Judgment was entered as to the main claim on April 30, 1970 pursuant to Rule 54(b), F.R.Civ.P.

We are here faced with certain legal contentions the resolution of which will determine the third party action. In connection with these questions of law including jurisdiction, motions have been filed by all parties herein to amend the pleadings to conform with the proof. Finally, both defendant and third party defendant have moved on several grounds for an order setting aside the verdict or in the alternative granting a new trial.

• • • • •

On July 30, 1964 Benazet was injured when, in the course of his duties as a brakeman employed by Erie, he attempted to tighten a handbrake on a railroad boxcar owned by

Atlantic. Plaintiff claimed, and the jury evidently so found, that the accident and consequent injuries occurred generally as follows: as he was applying the handbrake a rotted foot board gave way under his foot causing his weight to go upon the handbrake assembly which in turn broke away from the car as a result of the defective condition of the brackets affixing the handbrake assembly to the freight car resulting in plaintiff's fall. Proof at trial which the jury was entitled to credit, established that the brackets were defective in that they had fizzures over an inch long, a condition requiring years to develop. Some time prior to the accident an attempt had been made to repair the breaks in each bracket by spot welding, a highly improper procedure at best and performed so poorly herein that one witness described it as a "butcher job."

This car owned by Atlantic left its possession on June 4, 1964, less than two months prior to the accident. Between that date and July 27, 1964 when it was delivered to Erie, it is acknowledged that it had been in the possession of and operated over approximately seven different railroads in different parts of the country. Erie had this car in its possession for three days prior to July 30, 1964, the date of plaintiff's injury. Nevertheless, based on the testimony with respect to the age of the defects, we believe there was adequate evidence to support the jury's requisite finding on the element of proximate causation that Atlantic was either the cause or knew or should have known of the existence of the defects in the brackets of the car it placed in commerce and that there was no superceding cause of the accident.

At the time of the accident the boxcar from which plaintiff fell was on a carfloat owned by Erie. The carfloat was a barge (having no motor power) with tracks to accommo-

date railroad cars. This carfloat was moored on the Hudson River near the New Jersey shore next to an Erie float bridge—a floating pier used for the loading or unloading of carfloats. The carfloat was fully loaded and ready for its scheduled towing across New York Harbor to connect with the Long Island Railroad. At the time of his fall to the dock of the carfloat, plaintiff was tightening the handbrake involved here in order to make the last boxcar more secure for that voyage.

EXCESSIVENESS OF THE VERDICT; OTHER POST TRIAL MOTIONS

At the outset we dispose of defendant's and third party defendant's various motions to set aside the verdict and grant a new trial, which we denied after the jury's verdict but with leave to renew in writing.

As to the motions addressed to the claimed excessiveness of the jury's verdict: we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deep-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time.

Wages lost before trial, loss of future wages and increments thereon (the reasonable expectancy of working years was 22 as agreed upon), the medical expense actually incurred and reasonably to be anticipated, were closely calculated and met with no disturbing opposition. See *Grunenthal* v. *Long Island R. Co.*, 393 U.S. 156 (1968).

We were very strict in holding the jury to these items of damage only which the law countenances: [From the trial

judge's draft of the charge to the jury (court reporter's minutes not presently available).]

> "Now, what I have been laying down to you as to the law of damages is the law's formula for the assessment of damages. You have no power to alter that formula. Yes, you have the power under the law to determine the proper amount, if you should so find, of each item of damage, but you do not have the legal power to substitute another formula for the only one that the law recognizes. On all the items of damage you are to be guided by your common sense. As with everything else in this case, you are to be guided by what life has taught you, the experiences you have had, and such an award as you make must bear a reasonable relationship to the nature and extent of the injuries which you find, and all these items of damage then are to be totaled up into one lump sum."

With regard to the remaining motions: as indicated by our factual recital above, there was sufficient credible evidence of record to show liability on the part of defendant; the verdict was neither contrary to law; nor against the weight of the evidence.

Maritime Jurisdiction

After two days of trial and on the eve of the Court's charge to the jury, Erie served and filed a memorandum of law contending for the first time that it had only then come to realize (and its hasty research confirm) that this case was properly one of maritime jurisdiction. Prior thereto, and in accordance with the pleadings, all parties proceeded under the assumption that New Jersey law governed both the main action and the claim over, as the requests to charge submitted by all parties at that time reflect.

Opinion

Having insufficient time to resolve the difficult question of which law properly governed, we resolved, with the advance approval of all parties, to frame our charge and propound special interrogatories to the jury so as to prevent, hopefully, any possible need for a retrial regardless of the law eventually found applicable to the precise factual area defined herein. In substance, the jury specifically found Atlantic negligent and such negligence a proximate cause of plaintiff's injuries; plaintiff was not contributorily negligent; damages of $200,000; Erie also negligent and such negligence likewise a proximate cause of plaintiff's injuries.[1]

The jury's finding that plaintiff was not contributorily negligent, amply supported by the trial record, removed any problem as to whether any such negligence would be a complete bar or whether, instead, comparative negligence under maritime law was applicable. The remaining question is whether, despite the jury's finding of negligence by Erie as well as Atlantic, Erie is nevertheless entitled to dis-

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1. The interrogatories propounded and the jury's responses in full are as follows:

1. Was the Atlantic Coast Line Railroad negligent? A. Yes.

2. If yes, did such negligence contribute in any degree to the plaintiff's injuries? A. Yes.

3. Did plaintiff establish that he exercised due care for his own safety? A. Yes.

4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages? A. $200,000.

5. If your answer on question #3 was no, has defendant established that the planitiff was contributorily negligent? If yes, what percent? [not answered].

6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent? A. Yes.

7. If so, was such negligence a substantial factor in bringing about plaintiff's injuries? A. Yes.

missal of the third party action because: (1) either maritime law governs and contribution is not permitted in a non-collision suit such as this, or, (2) regardless of whether maritime law governs, under the New Jersey Joint Tortfeasors Contribution Act, 2A N.J.L.A. §53A, contribution is not available from an employer such as Erie against whom plaintiff's exclusive remedy is a compensation act, in this case the Longshoreman's and Harbor Workers' Act.[2]

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2. Atlantic informed the Court and Erie during the course of trial that it withdrew its cause of action for indemnity. Accordingly, the Court charged the jury only on Atlantic's third party claim for contribution and the interrogatories submitted to the jury did not inquire into the question of active-passive or primary-secondary negligence as between Atlantic and Erie. No objection was taken by Atlantic to either the Court's charge on the claim over or to the interrogatories propounded.

This withdrawal was so understood by Lloyd W. Roberson, Esq., counsel for Erie, who stated on the first page of a memorandum dated April 27, 1970 in support of his motions to dismiss, set aside the verdict and for a new trial: "Before submission of the case to the jury the indemnity claim was withdrawn."

Nevertheless, James J. Mennis, Esq., counsel for Atlantic, stated for the first time in the course of an affidavit (pages 4-5 thereof) dated May 8, 1970 in support of various post-trial motions to set aside the verdict and judgment thereon and grant a new trial:

> "However, the only comment deponent recalls making in response to the court's reference to indemnity, was that defendant Atlantic Coast Line Railroad Company was relying principally on its right to contribution. Deponent has no recollection of withdrawing defendant Atlantic Coast Line Railroad Company's right of indemnity. . . ."

In response Mr. Roberson avers:

> "6. As the court will recall, at a time when all counsel were in the robing room with the presiding judge, presiding Judge Irving Ben Cooper indicated to the attorney for the plaintiff that the attorney for the plaintiff would probably want to amend his pleadings to conform to the proof. Honorable Irving Ben Cooper also asked Mr. Mennis, counsel for the defendant and third party plaintiff, whether he was continuing his indemnity claim. Mr. Mennis, stated he was withdrawing the claim based on indemnity.

Opinion

There is undisputed diversity of citizenship jurisdiction over this action. Jurisdiction under 28 U.S.C. § 1332 being present, we believe it unnecessary, even with maritime law governing, that the parties amend their pleadings

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7. The effect of such announcement was to set the pattern as to the areas in which jurors would be asked specific questions or give responses to specific interrogatories.

8. After the statement of withdrawal by Mr. Mennis, there was no further consideration given to charging the jury relative to the same or proposing any specific interrogatories concerning such indemnity.

* * * * *

10. Furthermore, such withdrawal had a bearing on the approach that I took with the jury. A party in the position of the defendant is much less likely to obtain an affirmative finding of negligence on the part of the third party defendant where the jurors feel that an indemnity may be the remedy. The defendant and third party plaintiff is having its cake and eating it too if it were allowed to re-assert the indemnity claim in the present posture of the action." Affidavit of Lloyd W. Roberson, Esq., May 12, 1970.

Let's look at the record:

"The Court: Now Mr. Mennis—on the record—we did so much, I think we accomplished a lot off the record during the course of trial, but we can place on the record what we have agreed to.

Let the record show that you agreed to withdraw against Erie your claim for indemnity and to rely only on the claim of contribution.

Mr. Mennis: Yes, that's correct."

Minutes of Benazet v. Atlantic Coast Line v. Erie, April 16, 1970 (not transcribed as of the date of this opinion).

We need not rest solely upon this unequivocal withdrawal, however, for, in any event, the nature of the claims of negligence asserted against Atlantic by plaintiff and, in turn, against Erie by Atlantic, combined with the evidence developed at trial and the jury's finding that both were negligent appears to preclude the possibility of indemnity being successfully maintained. Atlantic's negligence was not "passive" or "secondary" and Erie's negligence "sole," "active" or "primary." See generally Gilmore & Black, The Law of Admiralty at 367-74 (1957). We believe the active-passive standard would be

to assert the possible additional jurisdictional basis in admiralty, 28 U.S.C. § 1333.[3] Accordingly, the motions to amend are denied.

Plaintiff's fall from the boxcar occurred on board a carfloat, a vessel then moored to a floating pier in navigable waters, loaded and scheduled to be towed across New York Harbor. While the question is not wholly free from doubt, we conclude that federal maritime law is the substantive law governing this case, both as to the prime suit and the claim over. See *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, 628 (1958). See also, *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334, 338-40 (1953) (a strikingly similar fact situation in which the Supreme Court held O'Rourke could not maintain an FELA action against his employer, his exclusive remedy held to be the Harbor Workers' Act); *Nogueira* v. *N.Y., N.H. & H. R. Co.*, 281 U.S. 128, 134 (1930). Indeed, both Atlantic and Erie appear to so concede. See Memorandum of Law of Defendant and Third Party Plaintiff,

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controlling on a claim of indemnity in this situation where the employer third party defendant has no contractual relationship with the defendant and third party plaintiff and where the defendant third party plaintiff cannot be held liable without fault. Compare *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, 132-33 (1956). There is no warranty running from Erie to Atlantic which might justify finding a contractural basis for indemnity. Compare *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 320-21 (1964).

3. Where the suit is, as here, *in personam*, it may be brought in federal court under the head of diversity of citizenship jurisdiction on the law side of the court (entitling one to a jury trial) on the basis that "Congress since 1789, in giving Federal District Courts original jurisdiction of civil cases in admiralty, has saved 'to suitors in all cases all other remedies to which they are otherwise entitled.'" *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines Ltd.*, 369 U.S. 355, 359-60 (1962).

May 11, 1970, p. 1; Memorandum of Law of Third Party Defendant, April 27, 1970.

CONTRIBUTION

Having found maritime law controlling, we are faced with the perplexing and often not wholly consistent body of law which frequents this area and from which we must obtain our guidance as to whether contribution is available. The leading case is *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952) in which the Supreme Court was faced with a conflict among the Circuits as to the existence and extent of contribution in non-collision maritime torts. A ship owner, sued for negligence and unseaworthiness by an injured employee of a shoreside contractor engaged by the ship owner to make repairs on a ship moored in navigable waters, impleaded the contractor seeking contribution on the ground the contractor's negligence had contributed to the injuries.

It was the conclusion of the Supreme Court that:

> "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. . . . Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

> In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. at 285-87.

This decision still stands and Congress has not acted to extend the law of contribution to non-collision matters. There has, however, been considerable erosion of the effect of *Halcyon*. Thus, in subsequent decisions the Supreme Court held contractually-based indemnity actions were maintainable although actions for contribution between joint tortfeasors were not. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). See also, Gilmore & Black, The Law of Admiralty at 367-74 (1957).

Conceding that maritime law is applicable and that *Halcyon*, while often circumvented, has not been overruled, Atlantic argues that there is a void in federal maritime law on the subject of contribution in non-collision cases and that, under settled principles, state law—here, the New Jersey Joint Tortfeasors Contribution Act—may be applied to fill that void as a supplement to the general maritime law. In the absence of a federal provision or common law right of action state wrongful death statutes have been invoked to recover for a maritime death. See *The M/V "Tungus"* v. *Skevenard*, 358 U.S. 588 (1958); *Hess* v. *United States*, 361 U.S. 314 (1960). There, too, Congress had enacted statutes providing for wrongful death actions in a limited number of situations, but had "stopped short" of providing full coverage. However, this possible analogy to *Halcyon* and the Supreme Court decision to not extend the maritime rule of contribution was not developed by the Supreme Court in its decisions incorporating state wrongful death statutes into maritime law.

In *Frueh* v. *Kupper* v. *Frueh*, 54 N.J. Super. 296, 148 A.2d 743 (1959) the New Jersey Superior Court reasoned:

> "The question of applicability of a state joint tortfeasors act was not discussed in the Halcyon case. The accident here occurred in waters within the geographical boundaries of New Jersey. The language of the Joint Tortfeasors Act has sufficient scope to include a maritime cause of action which arises in New Jersey. This act is broadly construed." 148 A.2d at 749.

The question is a close one. We believe, however, that the wrongful death cases are properly distinguishable and that *Halcyon* is determinative of the case at bar. The Supreme Court in *The Tungus* before adopting the state right of action for wrongful death reiterated "the established principle of maritime law that in the absence of a statute there is no action for wrongful death." 358 U.S. at 590. Thus, in adopting state wrongful death statutes, the Court never held that it had the power to create such an action at common law, but would refuse to do so because it was not convinced of its value and believed Congress by its selective action had expressed a contrary intent.

In contrast, in considering its power to fashion an extension of the existing maritime rule of contribution, the Supreme Court in *Halcyon* stated "we would feel free to do so here if wholly convinced that it would best serve the ends of justice." 342 U.S. at 285. Thus, as we see it, the *Halcyon* ruling that "[i]n view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so," cannot be seen as merely leaving a void in federal maritime law respecting contribution which a court is free to fill by the adoption of

a state contribution statute. We believe the Supreme Court has stated that with much Congressional legislation already in existence in this area, the decision whether to extend a right of contribution here and, if so, in what manner, must be left to the Congress in order to accommodate the "many groups of persons with varying interests . . . vitally concerned with the proper functioning and administration of these Acts as an integrated whole."[4] 342 U.S. at 286.

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4. Even if the New Jersey Joint Tortfeasors Contribution Act were adopted, the result would be far from clear. The Joint Tortfeasors Act is inapplicable to a third party suit against the employer of the injured plaintiff, at least where workmen's compensation exists and is the employee's exclusive remedy against his employer. See *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A 2d 752 (App. Div. 1954). The Supreme Court in adopting state wrongful death statutes holds that the right must be enforced as an integrated whole, with whatever conditions and limitations the creating state has attached. See *The Tungus* v. *Skovgaard*, 358 U.S. at 591-94.

Here, the third party suit is against plaintiff's employer. While state workman's compensation is inapplicable, plaintiff is covered by the Longshoreman's and Harbor Workers' Compensation Act, 33 U. S.C. § 901 et. seq. In the virtually identical fact setting of *Pennsylvania R. Co.* v. *O'Rourke*, 344 U.S. 334 (1952) the Supreme Court held that railroad employee's remedy was under the Harbor Workers' Act exclusively, and not under the F.E.L.A.

Since *O'Rourke*, however, longshoremen, covered by the Harbor Workers' Act, have been permitted to sue their own employer, where that employer is also the shipowner, for unseaworthiness, despite the provision of the Harbor Workers' Act that the liability of an employer under the Act "shall be exclusive and in place of all other liability." See *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731 (1967). Although plaintiff Benazet is not a longshoreman, the Supreme Court's reliance in *Jackson* on its expensive grant of the benefits of the seaworthiness doctrine to a wide range of maritime employees combined with its announced desire to avoid "a harsh and incongruous result" leads us to conclude that this plaintiff would probably be entitled to maintain a suit based on unseaworthiness of the carfloat owned by his employer Erie.

If we are correct, then the Harbor Workers' Act would not be plaintiff's exclusive remedy and the New Jersey Joint Tortfeasors

Conclusion

Accordingly, we hold that the third party claim for contribution must be dismissed as a matter of law.

So Ordered:

New York, N. Y.
July 2, 1970

United States District Judge

Law might in this context permit an action for contribution against Erie. If so, then two questions would still remain: (1) is unseaworthiness necessarily present here in light of the factual setting of a defective boxcar on board Erie's carfloat and the jury's finding that Erie was negligent? (2) If yes, might Erie nonetheless be entitled to indemnity from Atlantic for any liability to plaintiff on the ground Atlantic was primarily responsible and, if so, would this not preclude joint contribution?

We find it unnecessary to travel this tortuous path to a possible conclusion for the reason already set forth—we believe *Halcyon* determinative of the question here presented.

Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 70,670

Civil Action—No. 66 C 1404

THEODORE BENAZET,

Plaintiff,

against

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff,

against

ERIE LACKAWANNA RAILROAD COMPANY,

Third-Party Defendant.

The above entitled action having been tried before Judge Irving Ben Cooper and a jury on April 13, 14, 15 and 16, 1970; and the jury having answered the following stated interrogatories in the following manner:

1. Was the Atlantic Coast Line Railroad negligent? A. Yes.

2. If yes, did such negligence contribute in any degree to the plaintiff's injuries? A. Yes.

3. Did plaintiff establish that he exercised due care for his own safety? A. Yes.

4. If yes on questions #1 and #2 what is the total amount of plaintiff's damages? A. $200,000.00

5. If your answer on question #3 was no, has defendant established that the plaintiff was contributorily negligent?

6. If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent? A. Yes.

If so, was such negligence a substantial factor in bringing about plaintiff's injuries? A. Yes.

and having returned a verdict in favor of Theodore Benazet in the sum of $200,000.00, against defendant Atlantic Coast Line Railroad Company, and it further appearing that Rule 54b of the Federal Rules of Civil Procedure is applicable in that plaintiff is in monetary need of his money judgment and there is no just reason why judgment ought not be entered for plaintiff even though judgment as between defendant and third party defendant is not entered simultaneously herewith, and there being no prejudice to the defendant or third party defendant by the entry of judgment herein,

It is, on this 30th day of April, 1970,

ORDERED, that judgment in the sum of $200,000.00 be entered in favor of Theodore Benazet plaintiff, and against Atlantic Coast Line Railroad Company, defendant, with costs.

IRVING BEN COOPER
Judge U.S.D.C.

Judgment entered: 4/30/70

JOHN LIVINGSTON
Clerk

APPENDIX B

Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 474-475—September Term, 1970.

(Argued March 16, 1971 Decided April 23, 1971.)

Docket Nos. 35278, 35279

THEODORE BENAZET,

Plaintiff-Appellee,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY,

Third-Party Defendant-Appellee.

Before:

SMITH AND MOORE, *Circuit Judges,*
AND TIMBERS,* *District Judge.*

Appeal from $200,000 judgment entered upon jury verdict after trial in United States District Court for Southern District of New York, Irving Ben Cooper, *District*

* Chief Judge, United States Court for the District of Connecticut, sitting by designation.

Judge, and from order dismissing third party complaint. 315 F. Supp. 357 (S.D.N.Y. 1970). Affirmed.

JOSEPH P. ALTIER, New York, N. Y. (Bromsen & Gammerman, on the brief), *for plaintiff-appellee.*

DEVEREUX MILBURN, New York, N. Y. (Carter, Ledyard & Milburn, Frank G. Kurka, James J. Mennis and Jerome L. Getz, on the brief), *for Atlantic Coast Line Railroad Company, defendant and third party plaintiff-appellant.*

LLOYD W. ROBERSON, New York, N. Y. *for Erie Lackawanna Railroad Company, third party defendant-appellee.*

TIMBERS, *District Judge*:

Appellant Atlantic Coast Line Railroad Company (Atlantic) appeals from a $200,000 judgment entered against it after a four day jury trial in the United States District Court for the Southern District of New York, Irving Ben Cooper, *District Judge*, and from an order entered by Judge Cooper after trial dismissing Altantic's third party complaint against the Erie Lackawanna Railroad Company (Erie). 315 F. Supp. 357 (S.D.N.Y. 1970).

The accident occurred July 30, 1964. Plaintiff was employed as a yard brakeman by Erie. He sustained injuries while working on a box car owned by Atlantic. The box car was being moved from the shore near Jersey City, New Jersey, over a float bridge and on to a carfloat which is a barge with railroad tracks to accommodate railroad cars. The carfloat was owned by Erie. It was moored on the

Hudson River which is part of the navigable waters of New York Harbor just off the Jersey shore. Plaintiff fell from the box car to the deck of the carfloat. His fall was caused by a defective handbrake on the box car which he was attempting to tighten while standing on a footboard which had rotted and decayed. When the footboard and handbrake assembly gave way, plaintiff was catapaulted to the deck of the carfloat. No issue is raised on this appeal with respect to the defective conditions of the box car owned by Atlantic being the proximate cause of plaintiff's injuries.

Atlantic's essential claims on appeal are (1) that the case was erroneously submitted to the jury on the issue of contributory negligence; (2) that Atlantic's asserted right of contribution between joint tort feasors in a non-collision case was erroneously rejected in the dismissal of its third party complaint against Erie; and (3) that the trial judge erroneously refused to set aside the verdict as excessive. Finding no error, we affirm.

I.

We need not tarry long over Atlantic's claim that the case was erroneously submitted to the jury on the issue of contributory negligence. In the first place, in response to a written interrogatory submitted with the approval of all counsel, including Atlantic's, the jury expressly found that plaintiff was not contributorily negligent; and our independent examination satisfies us that this finding is adequately supported by the record. Furthermore, Atlantic's counsel not only did not object to the manner in which the judge submitted the issue of contributory negligence to the jury, but he participated in the formulation of the charge as given on this issue.

What happened was somewhat unusual. At the conclusion of the third day of the trial of an action that had been pending for four years, counsel for Erie submitted a memorandum of law indicating for the first time that general maritime law governed rather than the common law as all counsel and the judge had supposed up to that point. Confronted with this development at the close of the evidence and on the eve of summations and charge, Judge Cooper resorted to what strikes us as a sensible, practical method of resolving the dilemma: he invited all counsel to confer with him and to participate in the formulation of the charge and written interrogatories to be submitted to the jury, especially on the issue of contributory negligence. They did. There emerged a charge, agreed to by all counsel, under which the jury was instructed with respect to the applicable rule of contributory negligence under common law (complete bar to recovery) and under general maritime law (comparative negligence). The charge was accompanied by seven written interrogatories, also agreed to by all counsel, in response to which the jury was instructed to decide (No. 3) whether plaintiff had established "that he exercised due care for his own safety" (which the jury answered in the affirmative); or (No. 5), in the event its answer were in the negative to No. 3, whether defendant had established "that plaintiff was contributorily negligent" and, if so, "what per cent" (which the jury did not answer, having answered No. 3 in the affirmative).[1]

We have no doubt that the trial judge, if given more time to determine whether the common law or general mari-

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1. The seven written interrogatories, together with the jury's responses, are set forth in full in the District Court's opinion. 315 F. Supp. 357, 360 n. 1.

time law governed, would have preferred to have submitted the issue of contributory negligence to the jury differently. We are satisfied, however, under the circumstances that essential justice was done. And certainly Atlantic is foreclosed from claiming error with respect to a charge in which it acquiesced and to which it interposed no objection until after the return of a substantial verdict against it.

II.

Atlantic's third party claim against Erie was based alternatively on indemnity or contribution between joint tort feasors. At trial, in response to the judge's inquiry before charging the jury, Atlantic's counsel withdrew its indemnity claim. Such withdrawal was confirmed by Atlantic's counsel at the time of oral argument before us.

Atlantic however continues vigorously to press its contribution claim before us as it did below. It points to the jury's answers to written interrogatories Nos. 6 and 7 where the jury found Erie, as well as Atlantic, to have been negligent, and Erie's negligence to have been a substantial factor in bringing about plaintiff's injuries. Atlantic's contribution claim, so far as the equities are concerned, is appealing. But the controlling law is to the contrary.

Plaintiff having been injured aboard a vessel upon navigable waters, clearly general maritime law controls. *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, 628 (1959); *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953). The Supreme Court has expressly held that under general maritime law there is no contribution among joint tort feasors in a non-collision case, noting that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would

be inappropriate for us to do so." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-87 (1952).

Atlantic urges a variety of arguments, not without ingenuity, which add up to an invitation to us either to ignore *Halcyon* or to urge the Supreme Court to overrule it. We decline the invitation and adhere to the view expressed by this Court, through Judge Friendly, in *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1338 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969):

> "So long as *Halcyon* v. *Haenn* . . . remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court . . ."

For substantially the same reasons, we likewise decline Atlantic's invitation to permit "supplementation" of general maritime law with the New Jersey Joint Tortfeasors Act, N.J. Rev. Stat. §2A:53A (1952). Aside from the controlling bar of *Halcyon* to contribution in a non-collision case, we note that it is doubtful that the New Jersey statute is applicable to a third party action against the employer of an injured plaintiff. *Farren* v. *New Jersey Turnpike Authority*, 31 N.J. Super. 356, 106 A.2d 752 (App. Div. 1954). And in any event, Atlantic's basic argument that a state statute on contribution may be applied to fill a void in federal maritime law completely misses the point of *Halcyon*. There the Supreme Court did not create a *void* in the maritime law; it squarely held there is *no right of contribution* among tort feasors in a non-collision case.

We hold that Judge Cooper correctly dismissed Atlantic's third party complaint against Erie.

III.

Finally, Atlantic claims that the trial judge erred in refusing to set aside the $200,000 verdict as excessive and it urges us to order a remittitur.

Plaintiff, 37 years of age, sustained serious and painful injuries to his face, head, both legs and back. He has a 50% permanent disability in the use of his right leg and a 35% disability in the use of his left leg and low back. He was hospitalized for five weeks and was out of work for approximately one year following the accident. His annual wages were roughly $6,000. His life expectancy was 35 years, his working expectancy 22 years. His hospital and medical expenses were approximately $3,000. While he has returned to his former job, the record clearly establishes the permanency of his injuries, the diminution of his prospective earnings and the extent of his pain and suffering, past and future.

We note that the trial judge, who, along with the jury, was in a better position than we to observe plaintiff's demeanor and to assess his injuries, had this to say:

> ". . . we can well understand how the jury came to regard plaintiff's testimony as forthright, clean and without exaggeration. That portion of the entire trial record which concerns itself with the pain and suffering endured, and clearly to be anticipated, demonstrates experiences of deep-seated unremitting and excruciating pain, both physical and mental, over an extensive period of time."

We hold that the verdict, while substantial, was not excessive. It was not "so high that it would be a denial of justice to permit it to stand." *Dagnello* v. *Long Island R.R.*

Co., 289 F.2d 797, 806 (2 Cir. 1961). Nor was it "fantastic." *LaFrance* v. *New York, N. H. & H. R.R. Co.*, 292 F.2d 649, 650 (2 Cir. 1961), *aff'g* 191 F. Supp. 164, 168-71. See also *Gasperino* v. *Larsen Ford, Inc.*, 426 F.2d 1151, 1154 (2 Cir. 1970); *Bazydlo* v. *Placid Marcy Co.*, 422 F.2d 842, 843 (2 Cir. 1970); *Diapulse Corp of America* v. *Birtcher Corp.*, 362 F.2d 736, 744 (2 Cir.), *cert. dismissed*, 385 U.S. 801 (1966).

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April one thousand nine hundred and seventy-one.

Present:

Hon. J. JOSEPH SMITH,

Hon. LEONARD P. MOORE, Circuit Judges,

Hon. WILLIAM H. TIMBERS, District Judge.

THEODORE BENAZET,

Plaintiff-Appellee,

v.

ATLANTIC COAST LINE RAILROAD COMPANY,

Defendant and Third-Party Plaintiff-Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY,

Third-Party Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and is hereby affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk